Supreme Court, U.S.
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Docket No. 95 1458

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

CELESTIAL CHURCH OF CHRIST, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	October 1996 Term
	)	
CITY OF CHICAGO,	)	
	)	
Respondent.	)	
	)	

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, First Judicial District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Equal Protection Clause of the Fourteenth Amendment, a Compelling Interest, rather than a Rational Basis is required to sustain the termination of Petitioner's fundamental right to the free exercise of religion under a Chicago Zoning Ordinance which permits the location of community centers, meeting halls, amusement halls, theaters, stadiums, auditoriums, arenas, public libraries, recreation centers, and funeral parlors within a General Commercial District, but requires churches to obtain a special use permit.

2. Whether the trial court's injunction preventing Petitioner from holding church services and group activities amounts to a Substantial Burden under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act.

LIST OF ALL PARTIES TO THE PROCEEDING

1. Celestial Church of Christ, Inc. (No other subsidiaries or related parent companies exist.)

2. City of Chicago

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BASIS FOR JURISDICTION

On March 31, 1995, the Illinois Appellate Court, First District, entered an Order affirming the lower court's granting of summary judgment in favor of Respondent and against Petitioner. A Petition for Appeal as a Matter of Right was taken to the Illinois Supreme Court. On October 4, 1995, the Illinois Supreme Court denied the Petition. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(a) and Supreme Court Rule 10.

STATEMENT OF THE CASE

Petitioner, Celestial Church of Christ [hereinafter referred to as "Celestial Church" or "the Church"], appeals from an order of the Supreme Court of Illinois, dated October 4, 1995, denying Celestial Church's Petition for Appeal as a Matter of Right. The Church filed its Petition to the Illinois Supreme Court after an order entered by the Appellate Court of Illinois, First Judicial District, entered on March 31, 1995. The order of the Appellate Court affirmed an order of the Circuit Court of Cook County, Illinois, granting Respondent's Motion for Summary Judgment, dismissing Celestial Church's counterclaims, and entering a permanent injunction preventing Celestial Church from holding church services and group activities at their location. Celestial Church argues that the permanent injunction and the City of Chicago's [hereinafter referred to as "the City"] zoning scheme violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the First Amendment and Religious Freedom Restoration Act of 1993.

Celestial Church of Christ is an Illinois religious not-for-profit corporation, organized and existing under the laws of the State of

Illinois. The Church was located at 5840 N. Broadway, Chicago, Illinois. The Church was formed to serve the religious and spiritual needs of the Nigerian congregation, many of the members who lived in close proximity to the church.

On or about June of 1992, the Church entered into a lease for the second floor premises located at 5840 N. Broadway, an area that is classified as a C2-3 General Commercial District under the Chicago Zoning Ordinance. Pursuant to the Section 9.3-2 of the Chicago Zoning Ordinance, Petitioner was required to obtain a special use permit to operate in the aforementioned area. It is undisputed that Section 9.3-2 of the City of Chicago Zoning Ordinance requires that "churches," but not secular uses such as "meeting halls," "community centers," "stadiums," and "funeral parlors," obtain a special use permit. The Church applied for and was denied a building permit by the Zoning Administrator. The Church appealed the decision to the City of Chicago Zoning Board of Appeals ("ZBA"), which denied the its appeal on June 9, 1993.

On that same day, the trial court, Judge Retke presiding, granted the City's emergency motion for summary judgment and

request for an injunction. At the same time, the trial court allowed the Church to bring its constitutional challenge by way of counterclaim and affirmative defense based on 42 U.S.C. § 1983 and the Equal Protection Clause. The Church moved for summary judgment on the basis that the zoning ordinance facially violated the Equal Protection Clause of the Fourteenth Amendment. The City also moved for summary judgment. The trial court denied the Church's request to dissolve the injunction pending a determination of its constitutionality, but promised to rule on the Church's motion for summary judgment on or about July 23, 1993.

On July 28, 1993, Judge Retke transferred the case to the Chancery Division of the Circuit Court of Cook County, citing a Circuit Court General Rule which provided that Municipal Department judges shall not pass on the validity of a zoning ordinance.

At the hearing, the Chancery Court, Judge Albert Green presiding, erroneously placed the burden on the Church to show that Section 9.3-2 of the Chicago Zoning Ordinance was not valid. Judge Green stated, "the party challenging the classification has the burden of showing its invalidity."

After placing the aforementioned burden on the Church, Judge Green upheld the constitutionality of Section 9.3-2 and granted the City of Chicago's motion for a permanent injunction prohibiting the Church from operating as a church. On August 20, 1993, the trial court entered its judgment from which an appeal was taken. On or about November 17, 1993, after Judge Green's ruling, the President of the United States signed into law the Religious Freedom Restoration Act of 1993. This additional law was brought to the attention of the Appellate Court of Illinois on December 12, 1994. On March 31, 1995, the Appellate Court entered an order affirming the judgment of the trial court. The Appellate Court concluded that the City's actions violated neither the Free Exercise Clause of the First Amendment nor the Equal Protection Clause. However, the Appellate Court misapplied the law and the facts required by the "compelling interest" test in Petitioner's Equal Protection challenge and the First Amendment challenge. Celestial Church filed a timely Petition for Appeal as a Matter of Right to the Illinois Supreme Court. On October 4, 1995, the Illinois Supreme Court denied the Church's Petition and this appeal follows.

While it is the Order of the Illinois Supreme Court from which Celestial Church is appealing, this Petition addresses the merits of the Order of the Illinois Appellate Court, which the Illinois Supreme Court failed to review.

ARGUMENT

I. THE ILLINOIS SUPREME COURT ERRED IN DENYING PETITIONER'S PETITION FOR APPEAL BECAUSE THE APPELLATE COURT ERRED IN ITS ANALYSIS OF PETITIONER'S EQUAL PROTECTION CHALLENGE AND IN ITS ANALYSIS UNDER THE RELIGIOUS FREEDOM RESTORATION ACT.

Petitioner requests that the Order of the Appellate Court be reversed because the decision of the Illinois Appellate Court on the important federal question of religious freedom conflicts with relevant decisions of this Court. The Church's request that the Order of the Illinois Appellate Court be reversed is based on two arguments. Celestial Church first maintains that the Appellate Court applied the incorrect level of scrutiny, as required by the Equal Protection Clause to the United States Constitution, when evaluating its claim of the denial of its fundamental First Amendment Right. Petitioner's second argument maintains that the Appellate Court erred in its analysis of Petitioner's challenge under the Free Exercise Clause of the First Amendment, as codified by the Religious Freedom Restoration Act. As of the filing of this Petition, this Court has not yet spoken on the

applicability and scope of the Religious Freedom Restoration Act and the matter should be settled by this Court.

Nevertheless, this Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to require that "all persons similarly situated be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249 (1985); Plyler v. Doe, 457 U.S. 202 at 216, 102 S.Ct. 2382 (1982), citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 at 415, 40 S.Ct. 560 (1920). An Equal Protection mode of analysis must be applied when governmental action discriminatingly burdens a right clearly embodied in the Constitution, such as the First Amendment. Police Department of Chicago v. Moseley, 408 U.S. 92, 92 S.Ct. 2286 (1972); Zablocki v. Redhail, 434 U.S. 374, 434 S.Ct. 374 (1978). The Equal Protection Clause requires courts to apply strict scrutiny when the classification impinges on a fundamental right, such as the free exercise of religion. Plyler, 457 U.S. 202.

Further, the Religious Freedom Restoration Act states that if a law or governmental action is found to substantially burden the exercise of religion, a fundamental right guaranteed by the First

Amendment, the government must demonstrate that it has a compelling governmental interest in such a burden and that the interest could not be protected by less restrictive means. 42 U.S.C. § 2000bb-1; Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963). This Act guarantees the application of the compelling interest test to all cases where the free exercise of religion is substantially burdened by the government. Id. Therefore, the test for a First Amendment Free Exercise of Religion challenge and an Equal Protection challenge are the same, i.e., the government must demonstrate a compelling governmental interest and that such an interest could not be achieved through less restrictive means.

The Illinois Appellate Court first addressed the Church's Free Exercise challenge and then proceeded to an analysis of Appellant's Equal Protection challenge. Petitioner first addresses the Appellate Court's Equal Protection challenge.

A. THE APPELLATE COURT ERRED IN ITS ANALYSIS OF PETITIONER'S EQUAL PROTECTION CHALLENGE BY USING THE RATIONAL BASIS TEST, AND NOT A COMPELLING INTEREST TEST, TO SUSTAIN THE TERMINATION OF PETITIONER'S FUNDAMENTAL RIGHT TO FREE EXERCISE OF RELIGION.

After considering Petitioner's Free Exercise of Religion challenge, the Appellate Court analyzed Celestial Church's Equal Protection argument. The court, erroneously citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925 (1986), applied the rational basis test, rather than a strict scrutiny analysis as required by this Court's case precedent. See Plyler, 457 U.S. 202, 102 S.Ct. 2382; Grosz v. City of Miami Beach, 721 F.2d 729, 733, (11th Cir. 1983), cert. denied, 469 U.S. 827, 105 S.Ct. 108 (1984). City of Renton involved a time, place, and manner restriction under a claim of freedom of expression by an adult movie theater. Even in that case, this Court stated that the appropriate inquiry was whether the city ordinance was "designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." City of Renton, 475 U.S. at 50, citing Clark v. Community for Creative

Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065 (1984) and Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649, 101 S.Ct. 2559 (1981).

Thus, the Equal Protection mode of analysis must be applied when governmental action discriminatingly burdens a right clearly embodied in the Constitution, such as the First Amendment. Moseley, 408 U.S. 92; Zablocki, 434 U.S. 374. The Equal Protection analysis requires courts to apply strict scrutiny when the classification impinges on a fundamental right, not a rational basis analysis as was applied by the Appellate Court. Plyler, 457 U.S. 202. Therefore, in determining whether to apply strict scrutiny to city ordinances, this Court presumes such ordinances to be invidious whose classifications either "disadvantage[s] a suspect class or that impinge[s] upon the exercise of a fundamental right." Id. at 215.

When a party is claiming that an ordinance is impinging on a fundamental right, the examination must focus on whether the class-based denial of a particular right "has its source, explicitly or implicitly" in the Constitution. Plyler, 457 U.S. 217, n. 15. Government action violates the Constitution if it is aimed at impeding

religion, Grosz v. City of Miami Beach, 721 F.2d 729, 733, (11th Cir. 1983), cert. denied, 469 U.S. 827, 105 S.Ct. 108 (1984), and such action may only be upheld by surviving a strict scrutiny analysis.

In this case, the City does not contest that Section 9.3-2 of the Chicago Ordinance does not require secular uses such as a "meeting hall," a "community center," a "funeral parlor," an "arena," a "stadium," or an "amusement park" to obtain special permission to locate in commercially zoned areas, but does require "churches" to obtain special permission. The Church asserts that Section 9.3-2 of the Chicago Zoning Ordinance is unconstitutional because the ordinance distinguishes between secular and non-secular uses. Accordingly, zoning ordinances that discriminate between secular and non-secular uses are invalid if the ordinances are not "narrowly tailored to achieve a compelling government interest" which is supported by careful studies and legislative findings. City of Renton, 475 U.S. 41, Plyler, 457 U.S. at 216; Schad v. Mount Ephraim, 452 U.S. 61, 68, 101 S.Ct. 2176 (1981); Love Church v. City of Evanston, 671 F.Supp. 515 (N.D.Ill. 1987), vacated on other grounds, 896 F.2d 1082 (7th Cir. 1990).

In Love Church, 671 F.Supp. 515, the City of Evanston, Illinois had a zoning ordinance that required churches, but not hotels, meeting halls, music schools, and theaters, to obtain special use permits in commercial areas. Id. at 514. The Court held that scrutiny must be strict when a classification is based on religion. Id. at 515. The Court further held that a compelling governmental interest must be supported with careful studies and detailed legislative findings. Id., citing, City of Renton, 475 U.S. 41. Further, in Schad, 452 U.S. at 68, this Court held the defendant borough had not justified its substantial restriction of protected activity because the borough had failed to introduce any evidence to support its assertion that commercial areas were only to cater to the "immediate needs" of the community. Id. at 72.

The reasoning underlying the decisions in the aforementioned cases is that the free exercise of religion has a higher dignity under the Constitution than municipal or personal convenience. This reasoning has long been entrenched in constitutional jurisprudence. See, Martin v. City of Struthers, 319 U.S. 141, 151, 63 S.Ct. 862 (1943). Additionally, the right to free exercise of religion rises above mere property rights, and far outweighs considerations of public

inconvenience, annoyance, or unrest. Terminiello, 337 U.S. 1, 4, 69 S.Ct. 894 (1949). Without requiring that the City demonstrate that it had conducted any studies or present any evidence that the Church's location is incompatible with the commercial area, the trial court and the Appellate Court upheld the City's request for a permanent injunction (both Courts using the same lessened scrutiny analysis), thereby improperly placing mere property rights and allegations of public inconvenience above the Church's right to Equal Protection under the law and the free exercise of its religion.

The Appellate Court ignored the proper Constitutional test. Instead, the Court used the rational basis test, rather than the compelling interest test, as required by a strict scrutiny analysis, to justify an invidious ordinance which severely impinges upon a fundamental right found explicitly in the Constitution. Even under the erroneous use of the rational basis test, the City is still required to make a showing that the ordinance bears a rational relation to some legitimate interest and that the ordinance is not arbitrary. Never has the City made such a showing or presented any evidence demonstrating

such. Neither the City nor the Church was given the opportunity to partake in such a hearing.

Furthermore, the Appellate Court based its opinion on a groundless interpretation of Christian Gospel Church v. City of San Francisco, 896 F.2d 1221 (9th Cir. 1990), cert. denied, 498 U.S. 999, 111 S.Ct. 559 (1990). In that case, plaintiff church brought a civil rights action against the city of San Francisco alleging a violation of the free exercise clause and the equal protection clause. In its analysis of plaintiff's free exercise challenge, the Ninth Circuit stated that because the fundamental right to religion was involved, a correct analysis must necessarily involve an examination of the "existence of a compelling state interest justifying the imposed burden upon the exercise of religious belief." Id. at 1224.

In its equal protection analysis, the Ninth Circuit applied the rational basis test to the denial of plaintiff's conditional use permit. However, what the Appellate Court in this matter bypassed in its misplaced reliance on Christian Gospel Church, was that the San Francisco Ordinance was distinctly different from the Chicago Zoning Ordinance. The Ninth Circuit applied the rational basis test because

the ordinance did not implicate a suspect class or a fundamental right. Id. at 1225. If the ordinance had done so, a compelling interest test would be required by the Constitution. The Ninth Circuit came to this conclusion because plaintiff church "was treated no differently than a school or community center would have been." Id. at 1226. That is, "All assembly-type activities, such as schools, churches, and community centers, in this particular zone require conditional use permits." Id. at 1225. In contrast, the Chicago Ordinance does not require secular uses such as a "meeting hall," a "community center," a "funeral parlor," an "arena," a "stadium," or an "amusement park" to obtain special-use permit to locate in such an area, but does require "churches" to obtain special permission. Thus, the Chicago Ordinance, unlike the ordinance in Christian Gospel Church, implicates a fundamental right, and strict scrutiny is the proper analysis. Even the Ninth Circuit stated that "[w]e do not see any reason why churches alone should be treated differently than other types of assembly." Id. at 1226. The Appellate Court's equal protection analysis is therefore inaccurate.

Finally, Petitioner maintains that the ordinance is arbitrary and that it discriminates between secular and non-secular uses. However, not once has the City attempted (nor has either lower court required) to demonstrate why a Church should be treated differently from a meeting hall or a community center. Not once has the City offered a compelling governmental interest in differentiating between Churches and meeting halls and community centers. In fact, the City has not offered any reason whatsoever for the disparate treatment of churches under Section 9.3-2 of the zoning ordinance, other than merely to make the facile assertion that churches are a "residential" use. (see infra Footnote 1) The City advances this position out of thin air because it cannot offer any explanation which will pass Constitutional scrutiny and because it fails to provide the careful studies or legislative findings which the Constitution and case precedent absolutely demand.

Therefore, because the Appellate Court applied the incorrect level of Constitutional scrutiny and because there was no showing or no findings in the record to support the City's position, Petitioner seeks a Writ of Certiorari to this Court and requests that the Order of the Illinois Appellate Court be reversed.

B. THE APPELLATE COURT ERRED IN ITS DETERMINATION THAT THE BURDEN SUFFERED BY PETITIONER WAS NOT SUBSTANTIAL, THUS AVOIDING THE STRICT SCRUTINY ANALYSIS REQUIRED BY THE RELIGIOUS FREEDOM RESTORATION ACT AND THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The Appellate Court misapplied the facts and the law used in the compelling interest test in this case. The Court first stated that Petitioner was required to demonstrate that it was substantially burdened by the City's zoning scheme. In order to determine whether Celestial Church was substantially burdened, the Court employed a two-pronged test. The Court concluded first, that the City had a legitimate secular purpose for its zoning scheme. Second, the Court concluded that the burden on the City to alter its zoning regulations outweighed any burden on the Church. Finally, the Court noted that any burden suffered by Celestial Church was alleviated by the fact that

the Church could relocate in the remaining "40% of the City,"[1] which is zoned as residential.

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Oregon Department of Human Resources v. Smith, 494 U.S. 872, 110 S.Ct. 1595 (1990). But the exercise of religion often involves not only belief and profession but the performance of physical acts: assembling with others for a worship service, participating in the sacramental use of bread and wine, proselytizing, or abstaining from certain foods or certain modes of transportation. Id. Additionally, in Islamic Center of Mississippi v. City of Starkville, 840 F.2d 293 (5th Cir. 1988), the court stressed the importance a place of worship has on the free exercise of religion and free speech. The court stated:

> "The assembly of those bound by common beliefs and observances not only serves to create a sense of community

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[1] This "40%" figure on which the Appellate Court places such emphasis first appears as a bare assertion in the City's Motion to Dismiss Celestial Church's Counterclaim. (C. at 224, 231) Nowhere in the record has this assertion been proven nor has there been any hearing to present evidence and findings substantiating this figure. The City merely attempts to bootstrap this figure into the record by citing to the City of Chicago Municipal Code, which nowhere mentions this figure of 40%.

> among the members through the shared expression of their beliefs, it also communicates to outsiders the church's identity as a group devoted to a common ideal. By group worship, each worshiper communicates to outsiders the identity of the group and his own identity as a member of it, a form of self-expression. Ritual preserves, evidences, and perpetuates faith. If government exercises its power to affect group worship, it must demonstrate at least that the burden imposed serves an important government purpose and also that this purpose could not be accompanied by a means less burdensome to the exercise of religion."

Id. at 300.

The right to free exercise of religion rises above mere property rights, and far outweighs considerations of public inconvenience, annoyance, or unrest. Terminiello, 337 U.S. at 4. Thus, in determining whether to apply strict scrutiny, the U.S. Supreme Court presumes ordinances to be invidious whose classifications either "disadvantage a suspect class or that impinge upon the exercise of a fundamental right." When a party is claiming that an ordinance is impinging on a fundamental right, this Court examines whether the class-based denial of a particular right "has its source, explicitly or implicitly" in the Constitution. Plyler, 457 U.S. at 217, n. 15.

In Western Presbyterian Church v. Board of Zoning Adjustment, 862 F.Supp. 538 (D.D.C. 1994), the court concluded that

the Plaintiff church was entitled to a preliminary injunction against enforcement of decisions of the city's zoning administrator and Board of Zoning Affairs. These decisions required the church, located in a "special purpose zone," to obtain a variance for its homeless feeding program. The Court initially stated that the City had "no compelling government interest in prohibiting Western Presbyterian from conducting its feeding program . . . so long as the appropriate controls are in place." Id. at 545. The Court went on to say that zoning boards have no role to play in telling a religious organization how it may practice its religion. Id. at 546. A government cannot use its zoning laws to regulate the way a particular religion offers its prayers or the way a religion celebrates its holidays. Id.

In Love Church, 671 F.Supp. 515, vacated on other grounds, 896 F.2d 1082, the City of Evanston had a zoning ordinance that required churches to obtain special use permits in several commercial areas but did not require hotels, meeting halls, music schools, and theaters to obtain special use permits. Id. at 514. The Court held that "[i]f a classification is based on religion, then scrutiny is strict." Id. at 515. The Court further held that "[a] compelling governmental interest

must be supported with careful studies and detailed legislative findings." Id., citing, City of Renton, 475 U.S. 41.

Further, in Schad, 452 U.S. at 68, this Court held that when "a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." In Schad, the Court addressed the issue of whether a borough's zoning ordinance that prohibited all forms of live entertainment violated the First Amendment. The Court found that the Borough of Mount Ephraim had "not justified its substantial restriction of protected activity" because the Borough had failed to introduce any evidence to support its assertion that commercial areas were only to cater to the "immediate needs" of the community. Id. at 72.

Finally, the Illinois Supreme Court in Columbus Park Congregation of Jehova's Witnesses v. Chicago Board of Appeals, 25 Ill. 65, 182 N.E.2d 722 (1962), reversed the Appellate Court and ordered the issuance of a special use permit to plaintiffs because a zoning ordinance prevented plaintiffs from the practice of their religion at their particular location. The Court stated that this prevention served "in some degree to limit the free exercise of religion." Id. at 65. The

Court noted that plaintiffs had obtained a suitable and convenient store-front location within the area they seek to serve by the exercise of their religion. The Court also noted that any speculative traffic burdens on the City and any speculative burdens on surrounding business, were unjustified and conjectured. Lastly, the Court elaborated on the fact that almost all of the witnesses in this matter who voiced objections resided in neighboring residential locations where churches of any size were permitted.[2]

In the case at hand, the Appellate Court first determined that a substantial burden had not been placed upon Celestial Church, thus allowing the Court to avoid an application of the "compelling interest" test as required by the Religious Freedom Restoration Act. In order to determine whether a substantial burden existed, the Court used a two-

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[2] The City makes the assertion that churches are a "residential use" in paragraph 2 of "City of Chicago's Response to Celestial Churches Motion for Summary Judgement" filed July 23, 1993. The irony, hypocrisy, and absurdity of the City's position is laid bare by the fact that, and the record is replete with evidence that, the residents living in the residential area adjacent to the commercial district in which the Church is actually located have stimulated and participated in this action against the Church, making it abundantly clear that these residents do not want a church in a nearby commercial area let alone in the bosom of their residential area.

pronged test. The Court first determined that the zoning ordinance had a legitimate secular purpose. This test was taken from Grosz v. City of Miami Beach, 721 F.2d 729. However, this Court in Church of Lukumi Babalu Aye, Inc. v. Hialeah, ___ U.S. ___, 113 S.Ct. 2217 (1993), has implied that the analysis used in Grosz was improper. In a unanimous decision which held unconstitutional a Florida city ordinance which forbade the ritual slaughter of animals, the Court based its decision on the fact that the governmental interests quoted by the City did not justify the burden on such religious practices.

Secondly, the Appellate Court in the case at sub judice stated that the "inconvenience" of the Church's relocating did not outweigh the burden on the City to allow the Church to hold services at their location. However, what the Court failed to recognize was that in forbidding religious practice at Celestial Church and forcing the Church to relocate is a substantial burden in and of itself. It is evident that a church is substantially burdened when it is told not to hold religious services or group activities. The main purpose of having a church is so that the community may gather together and worship as

one. To deny this integral religious practice would essentially destroy any church and burden any religion.

As to the second prong of the Appellate Court's test, the Court determined that the inconvenience of relocating Celestial Church was outweighed by the fact that it could relocate elsewhere. However, there is no evidence and there have been no findings introduced into the record to substantiate the City or the Court's assertion that the "remaining 40% of the City" is zoned as residential, rather than commercial. (See supra Footnote 1) The City produced no evidence, no studies, and no findings on which to base this assertion. The remaining parts of the City which are not zoned as commercial, not only include residential, but also manufacturing, business, etc. Moreover, it is perhaps a greater burden for a church to seek a residential location rather than a commercial one. Commercial areas contain buildings and store fronts which hold a greater number of people. In fact, Celestial Church was located in a convenient store-front with a parking lot and in an area where a majority of its congregation resides. Commercial areas also contain parking lots and are better equipped to handle a greater number of persons and vehicles.

Residential areas are not as well-suited. Additionally, many residential areas contain single-family dwellings. Because a church such as Appellant cannot exist in a single-family residence, it would place a serious financial burden on such a church to find a vacant lot in a residential area and erect an entirely new building.

The Religious Freedom Restoration Act states that government cannot substantially burden religion without 1) a compelling interest which 2) cannot be achieved through less restrictive means. Respondent has no compelling interest to justify the termination of religious services at Celestial Church. The Appellate Court states that the City's interest in ensuring "the orderly growth and development of the city of Chicago" and complying with the Liquor Control Act are legitimate purposes. However, these are not compelling interests to pass muster for First Amendment purposes or for purposes of the Religious Freedom Restoration Act. The right of freedom of religion, and other First Amendment freedoms, rise above mere property rights. These rights transcend considerations of public inconvenience, annoyance, or unrest because these rights have a higher dignity under

the Constitution than municipal or personal convenience. Terminiello, 337 U.S. at 4; Martin, 319 U.S. 141.

Finally, even if such an interest by the City was found to pass constitutional muster as "compelling," such an interest could be achieved through less restrictive means. The Appellate Court rests its opinion on the speculation that by allowing Celestial Church to hold religious services and group activities, the dictates of the Liquor Control Act would be abolished. Section 6-11 of the Liquor Control Act forbids the issuance of liquor licenses to establishments located within 100 feet of a church in cities with a population of greater than 500,000. 235 ILCS 5/6-11 (West 1992). This argument by the City and the Appellate Court's reliance upon it amounts to puritanical moralizing which has no place in a court of law in the Twentieth Century urban setting. Once again, freedom of religion must rise above mere property rights and transcend considerations municipal or personal convenience. The practical considerations of where to locate a bar or tavern may easily be achieved through less restrictive means than forbidding church worship and practices. The interest and the right to free exercise of one's own religion far outweighs the local tavern owner's (or

the later-coming tavern owner) privilege to serve liquor. In this case, Petitioner, in any event, was not denied a permit because of any surrounding liquor establishments. Had it been so, a less restrictive means, such as regulating the hours of any surrounding liquor establishments, or regulating the hours of worship, could have been employed, rather than such a blanket prohibition employed by the Appellate Court in its Order.

In the case at hand, there is no evidence in the record, nor was there a showing by the City, that the City would suffer any burden by the performance of religious services at Celestial Church. This is because none of the Constitutionally required findings or studies were ever presented by the City. Nor was there a showing that the City relied on any evidence from other outside sources or other outside areas. The Appellate Court's decision in effect grants broad powers to the City to regulate zoning without making any showing or presenting any evidence to justify its actions. However, this Court explicitly held in both City of Renton, 475 U.S. at 50 and Schad, 452 U.S. at 68, that those broad powers end when zoning impinges on a fundamental right such as the right to the free exercise of religion. Therefore, because the

Appellate Court erred in finding that Celestial Church was not substantially burdened by the City and because the Appellate Court misapplied the proper Constitutional test, Petitioner seeks a writ of Certiorari to this Court and requests that the Order of the Appellate Court be reversed.

CONCLUSION

ACCORDINGLY, Petitioner requests that this Court grant a Writ of Certiorari, reverse the Order of the Appellate Court, dissolve the trial court's permanent injunction, grant Petitioner a special use permit, and find that Section 9.3-2 is facially unconstitutional. Additionally, Appellant requests that attorney fees and costs be granted pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 2000bb.

Submitted by,

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APPENDIX

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79004

ILLINOIS SUPREME COURT
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SUPREME COURT BUILDING
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No. 79004 - Celestial Church of Christ, Inc., petitioner, v. City of Chicago, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for appeal as a matter of right in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 26, 1995.

Third Division
March 31, 1995

No. 1-93-3309

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

CELESTIAL CHURCH OF CHRIST, INC.,	) Appeal from the
	) Circuit Court of
Defendant-Appellant,	) Cook County.
	)
v.	) No. 93-CH-6892
	)
CITY OF CHICAGO,	) Honorable
	) Albert Green,
Plaintiff-Appellee.	) Judge Presiding.

ORDER

Defendant, Celestial Church of Christ, Inc. (hereinafter Celestial Church), appeals from an order of the circuit court of Cook County in this case allowing the motion of plaintiff, the City of Chicago (the City), for summary judgment under to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 1992)), dismissing Celestial Church's counterclaims and entering a permanent injunction preventing the property's use as a church. This court has jurisdiction pursuant to section 6 of article VI of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and supreme Court Rule 301 (134 Ill.2d R. 301).

For the reasons which follow, we affirm.

Celestial Church conducted religious services several times a week at 5840 North Broadway Avenue in Chicago in violation of the City's zoning plan which had zoned the property "C2-3" for commercial and business purposes. Any property zoned C2-3 can be used by a religious body for a church only if it obtains a special use variation from the City's Zoning Board of Appeals (see Chicago Municipal Code §§ 17-9.3-2, 17-9.4-1, 17-9.4-2 (1994)); however, a church is permitted in all residentially zoned districts which constitute about 40% of the city (see Chicago Municipal Code §§ 17-7.3-1(4), 17-7.3-2, 17-7.3-3(1), 17-7.3-4(1), 17-7.3-5, 17-7.3.6(1), 17-7.3-7, 17-7.3-8, 17-11.10-2 (1994)).

The City brought this action against the building's owners seeking to enjoin this violation. On October 16, 1993, the circuit court granted Celestial Church leave to intervene and preliminarily enjoined Celestial Church from holding church services and group activities other than on Sundays from 11 a.m. to 2 p.m. Finally, the circuit court granted summary judgment in favor of the City, dismissed the counterclaims and entered a permanent injunction against the property's use as a church. This appeal followed.

On appeal, Celestial Church argues that the City's zoning scheme violates both the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See U.S. Const., amends. I, XIV.

The Free Exercise Clause prevents governments from forbidding any religious belief or form of worship (Cantwell v. Connecticut (1940), 310 U.S. 296, 84 L.Ed.2d 1213, 60 S.Ct. 90), or from manifesting hostility toward a particular faith (Fowler v. Rhode Island (1953), 345 U.S. 67, 97 L.Ed.2d 828, 73 S.Ct. 526) or religion in general (McDaniel v. Paty (1978), 435 U.S. 618, 55 L.Ed.2d 593, 98 S.Ct. 1322). This right is also affirmed by section 3 of article I of the 1970 Illinois Constitution. (Ill. Const. 1970, art. I, § 3.)[1] Recently, Congress has enacted the Religious Freedom Restoration Act of 1993 (hereinafter the Act) (42 U.S.C.S. § 2000bb (Law Co-op. Supp. 1994)) in response to the United States Supreme Court's decision in Employment Division v. Smith (1990), 494 U.S. 872, 108 L.Ed.2d 876, 110 S.Ct. 1595. (See 42 U.S.C.S. § 2000bb (a)(4) (Law Co-op. Supp. 1994).) In the Act, Congress, by statute, restores the "compelling interest test" set forth by the Supreme Court in Sherbert v. Verner (1963), 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790 and Wisconsin v. Yoder (1972), 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526, and guarantees its application to all cases where the free exercise of religion is substantially burdened and provides a claim or defense to persons whose religious exercise is substantially burdened by government. (See 42 U.S.C.S. §§ 2000bb(b)(1), (b)(2) (Law Co-op. Supp. 1994).) While the legislation was enacted after the

---

[1]We note that Celestial Church raised no argument here or in the trial court under our State constitution and, accordingly, our discussion herein deals only with Federal law.

commencement of this case, Congress clearly mandate that the Act have retroactive effect. (See 42 U.S.C.S. §§ 2000bb-3(b) (Law Co-op. Supp. 1994).) Accordingly, we consider Celestial Church's constitutional claims in light of the Act.

Both the Federal Constitution and the Act require that prior to subjecting a legislative enactment to a "compelling interest" test, the party challenging such enactment must demonstrate that he is "substantially burdened" by such a law. (42 U.S.C.S. § 2000bb (Law Co-op. Supp. 1994); Wisconsin v. Yoder (1972), 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526.) In order to answer the question of whether a substantial burden is placed on religious practice, courts employ a two-pronged test.

First, the legislation must have a legitimate secular purpose. "[G]overnment action violates the Constitution if it is based upon disagreement with religious tenets or practices, or if it is aimed at impeding religion." (Grosz v. City of Miami Beach (11th Cir. 1983), 721 F.2d 729, 733, cert. denied (1984), 469 U.S. 827, 83 L.Ed.2d 52, 105 S.Ct. 108.) If the "essential effect" of the law is to negatively influence the pursuit of religious activity or expression of religious belief, then such law violates the Free Exercise Clause. (Braunfeld v. Brown (1961), 366 U.S. 599, 607, 6 L.Ed.2d 563, 81 S.Ct. 1144.) In the case herein, we are convinced that the zoning plan meets the first prong. We believe the City Council had a legitimate secular purpose in enacting the zoning plan; namely, to ensure the orderly growth and development of the city of Chicago and comply with the dictates of

section 6-11 of the Liquor Control Act of 1934 (235 ILCS 5/6-11 (West 1992)), which forbids the issuance of a liquor license to business establishments located within 100 feet of a church in cities with a population greater than 500,000.

Second, as the City's zoning ordinance has a legitimate secular purpose, we must next balance the burden it imposes on Celestial Church against the burden the City would suffer if it altered its zoning scheme to allow Celestial Church's activities to proceed unimpeded. (See Christian Gospel Church v. City & County of San Francisco (9th Cir. 1990), 896 F.2d 1221, 1223-24, cert. denied (1990), 498 U.S. 999, 112 L.Ed.2d 565, 111 S.Ct. 559.) In this case, to allow Celestial Church and other religious groups to locate where they will in Chicago would clearly destroy the City's development plan and the State's regulation of liquor. This inevitably leads to an unacceptable unraveling of the City's zoning plan. Finally, while it may inconvenience Celestial Church to have to relocate, there nevertheless remains about 40% of Chicago which is zoned residential and therefore available for its purposes. Consequently, we feel Celestial Church is not substantially burdened. Accordingly, neither the First Amendment of the Act have been violated by the City.

Next, we examine Celestial Church's contention that the zoning plan offends the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws[.]" (U.S. Const. amend. XIV.) A law which passes muster for

First Amendment purposes, as we this one has, should be evaluated, for equal protection purposes, under the rational basis test and not strict scrutiny. (See City of Renton v. Playtime Theatres, Inc. (1986), 475 U.S. 41, 55, 89 L.Ed.2d 29, 106 S.Ct. 925, n. 4.).

The Equal Protection Clause in this case merely requires that government move upon a rational basis and not resort to a legislative classification that is palpably arbitrary. The presumption of constitutionality can be overcome only by a clear showing that the statute is arbitrary and insupportable by any set of facts. It is the burden of the person attacking a legislative classification to negate every conceivable basis which might support it. (See Christian Gospel Church v. City & County of San Francisco (9th Cir. 1990), 896 F.2d 1221, 1223-24, cert. denied (1990), 498 U.S. 999, 112 L.Ed.2d 565, 111 S.Ct. 559.) In the case sub judice, we fail to see how the zoning law is wholly arbitrary or insupportable by any set of facts. As we noted infra, these zoning laws are part of a comprehensive zoning scheme to regulate and control the growth and development of Chicago. Consequently, we find equal protection was not violated in this instance.

In light of the foregoing, the judgment of the circuit court is affirmed in accordance with Supreme Court Rule 23(b) (Official Reports Advance Sheet No. 15 (July 20, 1994), R. 23(b), effective July 1, 1994)).

TULLY, J. with RIZZI and CERDA, JJ., concurring.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT - FIRST DISTRICT

CITY OF CHICAGO, a municipal corporation,	)	
Plaintiff,	)	Case No.: 92 M1 405566
	)	Re: 5840 N. Broadway
v.	)	
	)	
NORMAN FERBER and LAWRENCE MARKS, et al.,	)	
Defendants.	)	

ORDER

This cause coming to be heard on Plaintiff's, City of Chicago ("City) motion for summary judgment and to dissolve the temporary restraining order, the court having jurisdiction of the parties and subject matter, due notice having been given, and after hearing arguments of counsel and being advised in the premises makes the following findings:

FINDINGS OF FACT

1. The property of 5840 N. Broadway ("subject property") is located in an area of the City of Chicago designated as a C2-3 General Commercial District.

2. Celestial Church of Christ, Inc. Is currently operating as a church on the second floor of the subject property.

3. Section 9.4-2 of the Chicago Zoning Ordinance permits churches to be located in general commercial district as a special use.

4. On September 28, 1992, Celestial Church of Christ filed an application for a special use under the zoning ordinance for the

approval of the location and the establishment of a church on the second floor of a 2-story brick building at the subject property.

5. A public hearing was held on the application by the Zoning Board of Appeals ("ZBA") on January 15, 1993, March 19, 1993 and May 21, 1993.

6. After having heard the testimony and arguments of the parties and being fully advised in the premises, the ZBA denied Celestial Church of Christ application for a special use.

7. On October 16, 1992, the court entered a temporary restraining order which would remain in effect until the ZBA ruled on defendant's application for a special use and further order of court.

8. The court takes judicial notice of the ZBA's administrative ruling on defendant's application for a special use.

Wherefore, It is Hereby Ordered:

1. The temporary restraining order of October 16 1992 is hereby dissolved.

2. Defendant, Celestial Church of Christ must immediately cease the use of 5840 N. Broadway as a church, including any group or religious activities associated with the church.

3. A daily fine of $200.00 per day will commence as of June 9, 1993 and continue until the subject property is no longer used as a church.

4. Defendant, Celestial Church of Christ, their agents, heirs or assigns are permanently enjoined from using the subject property as a church.

5. This matter is set for status and hearing on the City's motion to dissolve the temporary restraining order against Defendants,

Norman Ferber and Lawrence E. Marks on June 18, 1993 at 11:00 a.m. in Room 1107, Daley Center.

Hearing Date: June 9, 1993

ENTER:

/s/ Robert R. Retke
Judge

Susan S. Sher, #90909
Attorney for the Plaintiff

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Assistant Corporation Counsel
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SUMMARY OF THE RELEVANT SECTIONS OF THE CHICAGO ZONING ORDINANCE

The Petitioner is located in a C2-3 General Commercial District and, thus, Section 9.3-2 is the starting point of the Ordinance.

Section 9.3-2

A. Section 9.3-2 lists the permitted uses in the General Commercial Districts designated as C2-1 to C2-5.

B. Section 9.3-2 allows such uses as gas stations, hotels, and motels, etc.

C. Also, section 9.3-2(B) states that permitted uses in C2-1 to C2-5 districts include uses that are permitted in C1-1 to C1-5 districts.

Section 9.3-1

A. Section 9.3-1 lists permitted uses in C1-1 to C1-5 Restricted Commercial Districts.

B. Section 9.3-1 permits uses such as **amusement establishments, stadiums, auditoriums, arenas, community homes**, etc.

C. Also, C1-1 to C1-5 districts permit uses listed in B4-1 to B4-5 districts.

Section 8.3-4B

A. Section 8.3-4B lists permitted uses in B4-1 to B4-5 districts.

B. B4-1 to B4-5 districts permit uses such as **community centers, recreation buildings,** schools, **theaters**, etc.

C. Also, B4-1 to B4-5 districts permit any use in B2-1 to B2-5 districts.

Section 8.3-2

A. Section 8.3-2 lists permitted uses in B2-1 to B2-5 districts. This is the final list of permitted uses.

B. B2-1 to B2-5 districts permit uses such as **meeting hall**, dance schools, etc.

[Note: CHURCHES ARE NOT LISTED IN ANY OF THE ABOVE PERMITTED USES]

[Note: SPECIAL USE SECTIONS ALLOW OTHERWISE NOT PERMITTED USES TO LOCATE IN A GIVEN DISTRICT]

Special Use Section 9.4-2

A. Special Use Section 9.4-2 lists the uses in C2-1 to C2-5 districts that require a special use permit.

B. C2-1 to C2-5 districts require special uses for those required in C1-1 to C1-5.

Special Use Section 9.4-1

A. Section 9.4-1 lists those uses that require a special use permit in C1-1 to C1-5 districts.

B. Note that all uses listed in 9.3-1 are not required to obtain a special use permit, and therefore, are permitted in Section C2-3. Some of the uses listed in 9.3-1 are stadiums, **arenas, community homes**, etc.

C. C1-1 to C1-5 districts also require special use permits from those uses that B4-1 to B4-5 districts require.

Special Use Section 8.4-4

A. Section 8.4-4 lists the uses that require a special use permit in B4-1 to B4-5 districts.

B. Section 8.4-4 provides that uses permitted in 8.3-4 (**amusement establishments, recreation centers, community centers, theaters,** schools, etc.) Are not required to obtain a special use permit and therefore, are permitted in C2-3 districts.

C. B4-1 to B4-5 districts require special use permits from those listed in B3-1 to B3-5.

Special Use Section 8.4-3

A. Section 8.4-2 lists the uses that require a special use permit in B3-1 to B3-5 districts.

B. B3-1 to B3-5 districts require special use permits from those listed in B1-1 to B1-5 districts.

Special Use Section 8.4-1

A. Section 8.4-1 lists the uses that require a special use permit in B1-1 to B1-5 districts.

B. ***Churches are required to obtain a special use permit in B1-1 to B1-5 districts.***

RELIGIOUS FREEDOM RESTORATION ACT OF 1993

42 U.S.C. 2000bb

CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS. The Congress finds that:

(1) the Framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interests.

(b) PURPOSES. The purposes of this act are:

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. 2000bb-1

FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

© JUDICIAL RELIEF. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

42 U.S.C. 2000bb-2

DEFINITIONS.

As used in this Act:

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the Unites States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

42 U.S.C. 2000bb-3

APPLICABILITY.

(a) IN GENERAL. This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION. Federal statutory law adopted after the date of the enactment of this Act is subject to this Act

unless such law explicitly excludes such application by reference to this Act.

© RELIGIOUS BELIEF UNAFFECTED. Nothing in this Act shall be construed to authorize any government to burden any religious belief.

42 U.S.C. 2000bb-4

ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used int his section, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

APPELLATE COURT OF ILLINOIS
FIRST DISTRICT-THIRD DIVISION
93-3309

CELESTIAL CHURCH OF CHRIST, INC.,	)
	)
Appellant,	)
	)
vs.	) Appeal from the Circuit
	) Court of Cook County,
CITY OF CHICAGO,	) Judge Albert Green
	) presiding, 93 CH 6892
Appellee.	)

APPELLANT'S MOTION TO ADVISE THE COURT

Appellant moves to advise the Court as follows:

1. On or about November 17, 1994 the Religious Freedom Restoration Act of 1993 [hereafter "RFRA"] became law and has been codified as 42 U.S.C. 2000bb. The RFRA essentially codifies the "Compelling Interest Test," as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972). A copy of RFRA is attached hereto.

2. Appellant has urged that the trial court in granting appellee's motion for summary judgment applied, in error, the rational basis test. Neither appellant's brief nor appellee's brief brings this change in the law to the Court's attention.

3. Oral argument in this matter is set for December 14, 1994 at 10:00 a.m.

ACCORDINGLY, Appellant requests that judgment granting appellee's motion for summary judgment be reversed and the case remanded for further proceedings.

/s/ Edward A. Voci
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